Statement
United States Senate Committee on the Judiciary
Improving the Administration of Justice: A Proposal to Split the Ninth Circuit.
April 7, 2004

The Honorable Jeff Sessions
United States Senator , Alabama

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OPENING STATEMENT OF JEFF SESSIONS, CHAIRMAN

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

APRIL 7, 2004

The Subcommittee on Administrative Oversight and the Courts will come to order. I am pleased to convene this hearing on a division of the Ninth Circuit.

At the outset, I suppose the first question one would ask is one I should answer, as the Chairman of this Subcommittee and a senator long interested in judicial administration: "Why are we discussing a division of the Ninth Circuit now?"

To answer that question, we need to appreciate the basic purposes of a federal court of appeals. In our federal judicial system, an appellate court has two basic functions. First, it must review lower court and agency decisions. In this regard, it acts effectively as the court of last resort, since the Supreme Court reviews very few court of appeals decisions each year. Second, to borrow from Chief Justice Marshall's famous opinion in Marbury v. Madison, it must say clearly and consistently "what the law is" for that circuit. Uncertainty in the law frustrates litigants, encourages wasteful lawsuits, and undermines the rule of law.

How well does the Ninth Circuit today fulfill those two basic functions? We start with some undisputed facts. The Ninth Circuit is the largest circuit in our system, by far. It covers almost 40% of the land mass of the United States, stretches from the Arctic Circle to the border of Mexico, and rules almost one-fifth of the population of the country. It now has 28 authorized circuit judgeships — 11 more than the next circuit, as this chart shows, and almost 17 more than the average circuit. It also has 21 senior judges. It is therefore not much of an exaggeration to say that the Ninth Circuit panel assigned to a particular case is truly a luck-of-the-draw panel.

In addition, the Judicial Conference of the United States has recommended that Congress create seven additional judgeships for the Ninth Circuit. If we did so, the court would have 35 active judges, making it even more oversized. Nobody would claim that our Supreme Court could function with 35 Justices. Why should we feel any different about a Ninth Circuit with 35

active judges and 21 senior judges, given that the court of appeals is the court of last resort in the vast majority of cases? Counting senior judges, the Ninth Circuit would be twice the size of any other circuit!

Moreover, as this chart illustrates, the caseload of this large circuit has exploded in recent years. In 1997, about 8,700 appeals were filed in the Ninth Circuit. In 2003, there were almost 13,000 – a 48.1% increase, or over 4,000 more appeals, in just six years.

This huge increase in caseload appears to have impaired the administration of justice in the court of appeals. The Ninth Circuit's efficiency in deciding appeals — that is, the time the court takes between the filing of a notice of appeal and the final disposition of a case – consistently has lagged far behind other circuits.

In 2003, for instance, the Ninth Circuit had 418 cases pending for three months or more – 25 shy of the next five circuits combined. The next highest circuit had 98 such cases. The next chart shows that 138 cases were pending in the Ninth Circuit for over a year. This was more than every other circuit in the federal system combined, with the next highest circuit at a mere 19 cases. This delay cannot be explained by a lack of judgeships; although the caseload is high, several other circuits have higher caseloads per judge. Thus, it appears that the first function of a court of appeals – reviewing decisions from below – may not be performed as well as it could be.

If population growth is any indication, the problem is quite likely going to get worse. As you can see from this chart, the population of the states within the Ninth Circuit grew faster than that of any other circuit between 1990 and 2000. That population is projected to grow even more substantially between 1995 and 2025, as this next chart demonstrates. With the higher caseload those millions of new residents will bring, the administrative challenges can only grow.

How about the second function? Are Ninth Circuit judges able to speak with clarity and consistency on what the law of the circuit is? This too appears doubtful. Because the circuit has so many judges, it is difficult to preserve the collegiality that is so important to judicial decision-making, as D.C. Circuit Judge Harry T. Edwards eloquently has argued:

"In the end, collegiality mitigates judges'
ideological preferences and enables us to
find common ground and reach better decisions.
In other words, the more collegial the court,
the more likely it is that the cases that come
before it will be determined on their legal merits."

Additionally, the Ninth Circuit employs a limited en banc procedure under which it is not the full court of appeals, but a random draw of 10 judges, plus the chief judge, that reviews three-judge panel decisions. This can result – and has resulted – in a mere six judges making the law for the entire circuit (even when more than six judges on the court as a whole have taken an

opposite position on the record). In all other circuits, en banc means en banc – the full court.

Finally, with so many cases decided each year, it is hard for any one judge to read the decisions of his or her peers. And it is virtually impossible for lawyers who practice in the circuit to stay abreast of the law. Judge Edward Becker, a distinguished judge on the Third Circuit, has explained that:

"[W]hen a circuit gets so large that an individual judge cannot truly know the law of his or her circuit . . . , the circuit is too large and must be split. . . . I cannot imagine a judge in a circuit as large as the Ninth, with its staggering volume of opinions, being able to do what we in the Third Circuit do."

These factors – loss of collegiality, the limited en banc, and an inability to monitor new law – undermine the goal of maintaining a coherent law of the circuit.

Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, and Kennedy publicly have agreed on the need for structural reform, and no other Justice has disagreed. These jurists voiced their concern six years ago. Today, the Ninth Circuit issues almost 50% more decisions than it did at that time. It is difficult to argue that Ninth Circuit judges and lawyers reviewing the flood of opinions find the law any more coherent. So is this a circumstance in which the Congress should exercise its constitutional power to "ordain and establish" new inferior courts?

Two of my colleagues are here to help us answer that question. Senator Lisa Murkowski of Alaska has been a leader in addressing reorganization of the Ninth Circuit, and has introduced a bill, S. 562, to restructure the circuit. I am sure that her comments, based on her experience as a senator from the Northwest and as a lawyer who practiced within the Ninth Circuit, will give us a useful context for understanding the issue.

I also would like to commend my colleague, Senator Dianne Feinstein, for her interest in Ninth Circuit reorganization. Senator Feinstein has long advocated that the Congress look at objective measures in determining whether to split the circuit, and has wisely insisted that a split serve administrative, not political, purposes. In fact, the very title of this hearing borrows from a speech she gave on the Senate floor several years ago in which she stated, "That is the fundamental question: Would a split improve the administration of justice, and, if so, what should that split be?" Senator Feinstein asks the precise question I intend to focus on during this hearing. I look forward to the insights from our distinguished group of witnesses.

We will hear from two panels of witnesses today. On the first, we will discuss whether a split of the Ninth Circuit is warranted. We also will address the merits of various legislative proposals to effect such a split, including Senator Ensign's bill, S. 2278; Senator Murkowski's bill, S. 562; and Congressman Mike Simpson's bill, H.R. 2723. The witnesses on this panel,

starting from my left, are Chief Judge Mary Schroeder, appointed to the Ninth Circuit by President Carter in 1979; Judge Diarmuid O'Scannlain, appointed to the Ninth Circuit by President Reagan in 1986; Judge Richard Tallman, appointed to the Ninth Circuit by President Clinton in 2000; and Judge J. Clifford Wallace, appointed to the Ninth Circuit by President Nixon in 1972.

On the second panel, we will focus on the administrative aspects of a split, with reference to the most recent restructuring of a federal judicial circuit. In 1981, Florida, Georgia, and my home state of Alabama were carved out of the Fifth Circuit to become the Eleventh Circuit. This reorganization was initiated in large part because of the size of the circuit, and has proven to be a tremendous success in terms of judicial administration. Two witnesses will share their wisdom on this panel. The first will be Judge Gerald Bard Tjoflat, who was appointed to what was then the Fifth Circuit by President Ford in 1975, and who has served on the Eleventh Circuit since 1981. The second witness will be Chief Judge John Coughenour, appointed to the Western District of Washington by President Reagan in 1981.

With that, I turn to my colleague, Senator Feinstein, for her opening statement.